FOR ARGUMENT

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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1082

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

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BRIEF FOR RESPONDENT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Introduction

Respondent International Longshoremen's Association, AFL-CIO ("ILA") submits this brief, pursuant to Rules 40(3) and 41(2) of the Rules of this Court in response to the briefs filed by Petitioner National Labor Relations Board and the parties and *amici curiae* supporting it.*

* References in this brief designated "Pet. App." are to the pages of the appendix to the Board's petition for certiorari; references designated "A." are to the pages of the separately bound appendix; and, references designated "PB" are to the pages of the Board's brief.

Questions Presented

1. Whether collectively bargained work rules designed to preserve and protect for longshoremen their historic and traditional work of loading and unloading ocean-going cargo at maritime terminals from equipment belonging to the steamship employers were primary so as to be lawful under the doctrine of work preservation enunciated by this Court in *National Woodwork Manufacturers Association* v. *NLRB*, 386 US 612 (1967)?

2. Whether, under national policy on work preservation, the NLRB erred when it found a violation of Labor Management Relations Act §§ 8(b)(4)(B) and 8(e) on the basis of its definition of "the precise work in controversy" as the work generated by technological innovation rather than the historic work of the employees threatened and/or displaced by the technological change, i.e., that of the employees of consolidators and truckers rather than that of longshoremen?

Statement of the Case

The dispute herein is whether the Rules on Containers violate the hot-cargo and secondary boycott provisions of the Labor-Management Relations Act. The Rules are collectively bargained provisions whereby vessel owners are enabled to make full use of intermodal maritime containers while preserving to their longshore employees that part of the traditional work not eliminated by the new technology. In essence, they permit containers which perform a genuine intermodal transportation function to cross the docks intact. But they prevent the diversion of still necessary longshore work to nearby inland loading docks.

Respondent ILA maintains that seen in the light of their historical evolution, their subject, and their purpose, the Rules are entirely lawful. Far from acquiring work, they permit the employer to eliminate 80% of longshore cargo handling. Far from being secondary, they apply only to equipment owned and controlled by ILA employers. Their purpose and effect is to preserve the very essence of traditional longshore work, the handling of maritime cargo at the pier.

The Effect of Containerization on Traditional Longshore Work

The Rules on Containers are a response to the impact of technology on the longshore industry. Historically, the handling of ocean cargo has been the work of longshoremen employed at the piers by vessel carriers and/or stevedores. This included not only the piece-by-piece receipt and delivery of the goods but also sorting, checking, storage, palletizing, repair, maintenance of the cargo, and virtually all of waterfront terminal functions.* Containerization drastically reduced longshore work opportunities.

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* The Board's certification of the longshore unit in the Port of New York bears out the broad spectrum of dockside work.

> All longshore employees engaged *in work pertaining to the* rigging of ships, coaling of same, *loading and unloading of cargoes* including mail, ships' stores and baggage, handling lines in connection with the docking and undocking of ships including hatch bosses, cargo repairmen, checkers, clerks and timekeepers, and their assistants, including head receiving and delivery clerks; general maintenance, mechanical and miscellaneous workers; horse and cattle fitters, grain ceilers and marine carpenters, in the Port of Greater New York and vicinity. . . . *Matter of New York Shipping Association*, 116 NLRB 1183, 1188 (1956).
> (emphasis supplied)

This Court has recently recognized the practical reality that longshore work includes virtually all functions within the maritime terminal. *P.C. Pfeiffer Co.* v. *Ford*, ——*US*——, 62 L.Ed.2d 225 (No. 78-425, Nov. 27, 1979).

Containers are large, reusable, metal receptacles, some capable of carrying 30,000 pounds of cargo, which can be moved on or off an ocean vessel intact and which can carry cargo of virtually any kind or configuration. Pet. App. 4a-5a; A.193. Container ships, which first appeared in 1957, are specially designed and constructed to carry containers. A.117, 212.

Vessel carriers understandably welcomed containerization not only in its labor-saving aspects but also because of the increased productivity it affords their ships which no longer need lay over in port for piecemeal unloading and loading between runs. *Northeast Marine Terminal Co.* v. *Caputo,* 432 US 249, 269-270 (1977). Ross, *Waterfront Labor Response to Technological Change*: *A Tale of Two Unions,* 21 Lab. L.J. 397, 399-400 (1970); A.211-212, 464, 603, 627-628. On the other hand, longshoremen from the first recognized containerization as a serious threat to their work opportunities, a fear proved justified through the years.* A.118-123, 604. *Ross, supra.* Note 4 at 400-401; 405, 418-419.

Containerized vessels are not loaded piece by piece, or break-bulk. However, the work of loading or unloading still remains. Loose cargo must still be handled at some point. The modular holds of container ships—the container—permits this to be accomplished at a place other than on board the vessel. *Pfeiffer, supra;* Note 1, 62 L. Ed. 2d at 235-236. *Caputo, supra* at 269-270, 276.

The impact of containerization took away from the ILA worker much of the work previously available. The productivity factor for handling cargo rose by two thousand (2,000%) percent over the break-bulk method. This increased productivity perforce took away the work of longshoremen. Labor requirements on the docks and manhours of ILA employment were drastically reduced.* Pet. App. 5a, 121a; A.627-630; A.150.

* In the period September 30, 1958 to September 30, 1976, despite the fact that tonnage passing through the port had doubled, statistics in the Port of New York showed a loss of 19,365 longshore jobs and/or 23,140,549 hours of work. A.464, 603, 627-628.

The Rules on Containers

Pursuant to Congress' policy of leaving the resolution of problems like those engendered by technology to the collective bargaining process, Petitioner ILA and representatives of employer groups have evolved the work rules which give rise to the present case. The history has been one of heated labor strife. At first the ILA refused to handle any containers. The decade 1958-1968 was marked with strikes and work stoppages as the parties unsuccessfully tried tentative solutions acceptable to both sides. After a strike which lasted 57 days in New York and 100 days in other ports following expiration of a Taft-Hartley injunction, a Presidential Board of Inquiry established pursuant to the national emergency provisions of the Taft-Hartley Act reported that one of the two issues separating the parties was "the impact or consequences of containerization or mechanization." With the aid of David Cole, a mediator appointed by the President of the United States, an agreement of lasting duration was reached on January 12, 1969 and incorporated in the 1968-1971 collective bargaining agreement. Pet. App. 5a-18a, 121a-122a. A.118-123, 604-621.

The underlying dynamic of the compromise was a relinquishment, not an acquisition of work by the ILA. In return for various considerations, the union significantly

* "Labor productivity is astonishingly increased by containerization. * * * These savings, it should be noted, come about because of a reduction in man-hours—a fact of menacing importance when we turn to collective bargaining agreement on the issue." In Ross, *Waterfront Labor Response to Technological Change*: *A Tale of Two Unions, supra,* at 400.

relaxed its insistence that all containers be stuffed (loaded) and stripped (unloaded) by longshoremen. This concession was premised upon the employers adherence to a set of provisions known as the "Rules on Containers." 62a-66a, 141a-148a. A.235-286.

The basic compromise underlying and embodied in the Rules is that, if there is to be any handling of ocean cargo by employees within the local port area (other than employees of the beneficial owner of the cargo), that work should continue to be performed at the piers by ILA labor, as it has been historically. Pet. App. 14a-16a, 124a; A.606. The employers' associations agreed that this small portion of the ILA's traditional longshore work jurisdiction should be preserved by their ocean carrier members, who own or lease the containers and who alone can control how, where and by whom they shall be loaded and unloaded.

At the same time, the ILA contractually agreed that the loading and unloading of cargo in full-shipper-load (FSL) containers,* which constitute the overwhelming bulk of container movements, could be performed by the shipper's or manufacturer's employees. A.612. Similarly, consolidated ("LTL") containers** might also be handled intact *provided* that the actual consolidation took place more than fifty miles from the center of the port. Pet. App. 9a-10a; A.121-122, 235-242. On these containers, the ocean carriers paid a symbolic royalty on cargo tonnage as a partial substitute for the lost manhour contributions occasioned by the reduction in manhours resulting from containerization.

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* A full shipper's load may be defined as a container full of goods destined to a single consignee, who is the beneficial owner of the goods within and whose own employees perform the loading or unloading of the container. Pet. App. 9a, 120a, 140a. A.176.

** Consolidated containers are those holding goods of several shippers or consignees and loaded by shipper/receiver service organizations, known as "consolidators". Pet. App. 9a, 120a, 140a.

Pet. App. 15a; A.606-607. That royalty stands as a recognition of the ILA's historic entitlement and claim to the handling of all cargo within the containers.

The Rules preserved a small part of the longshoremen's historic work. On the other hand, the shipping industry received the right to move most containers without stuffing or stripping by ILA longshoremen. Full-shipper-loads as well as all containers coming from or going to points fifty or more miles from the port were excluded from the stuffing and stripping requirements. These constituted approximately 80 per cent of the containers. By this collectively bargained compromise, the ILA removed the major obstacle to progress. Containerization could flourish, and the shipping industry has enjoyed a monumental increase in longshore productivity. Pet. App. 9a-10a; 121a-122a; A.150, 213a-214a, 612.

Development of Off-Pier Consolidators

At the inception of containerization, the steamship carriers had virtually complete control over the work of loading and unloading their containers. This work could be, was and continues to be done by the carriers' ILA labor at the piers. A.628-629. However, in order to reduce their direct ILA labor costs, the automated steamship carriers since the beginning have encouraged and induced the performance of some of this traditional ILA pier work at off-pier facilities. This was accomplished by making their containers available off-pier and by granting preferential, reduced shipping rates on containerized cargo crossing the docks intact. A.515-518, 631-634. The consolidation industry was thus created and actively nurtured by the steamship carriers.

The consolidation business generated by containerization naturally gravitated to the already established industry of

freight forwarding.* Freight forwarders were companies which had previously serviced shippers of goods by arranging for the routing and passage of cargo. Prior to containerization freight forwarders arranged to have goods brought to or picked up from the piers, where they were handled break-bulk by longshoremen in the traditional method. A.209-210. Containerization added the significant factor that now the equivalent of the hold of the ship could be brought to the freight forwarders' premises. Until this was possible, freight forwarders/consolidators, like truckers, were but a link in the chain of transportation which always began or ended with the longshoremen's handling of the goods. When consolidators began to have their own employees stuff and strip containers, the work longshoremen had always performed was displaced. See, 20a-21a; A.526-528, 545.

Since, under the favorable tariff rates procured for consolidators by the shipping companies, the costs—and thus the LTL rates—applicable off-pier were less than those charged on-pier, the inevitable result was the siphoning of LTL cargo from the piers by the consolidators. In effect, ILA automated employers secured loading and unloading of the cargo carrying portions of their vessels by non-ILA labor at cheaper rates. The ILA could correctly perceive this as thinly disguised sub-contracting. A.608-610, 613-614, 615-617, 631-635.

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* Indeed, it has been noted that, due to the continued opposition of the Interstate Commerce Commission, freight forwarders were struggling at the advent of containerization and had to find new ways to survive, including the loading and unloading of containers. Ullman, *The Role of the American Ocean Freight Forwarder in Intermodal Containerized Transportation,* 2 J. Mar. L. & Com. 625 (1971). Thus, it was the consolidators who reached out and acquired new work, which previously had been performed by longshoremen.

Testing of The Rules

The Rules had been redefined and codified in 1968-69 with the aid of Presidential Mediator David Cole. Pet. App. 6a-7a. They were soon subjected to administrative and judicial scrutiny. International Container Transport Corporation ("ICTC") filed unfair labor practice charges with the Newark Region of the NLRB in mid-1969, alleging that the Rules violated Sections 8(e) and 8(b)(4)(B) of the Act. The Regional Director investigated and dismissed the charges. He upheld the validity of the Rules on the grounds that they were intended to protect stuffing and stripping work traditionally performed by longshoremen. His determination was sustained by the Board's General Counsel. A.614-615, 621.

ICTC then brought an action alleging that the Rules violated the anti-trust laws. Consistent with the NLRB's conclusion, the Court of Appeals for the Second Circuit upheld the lawfulness of the Rules, finding that the provisions, bargained for at arms-length:

> have as their object to the preservation of work traditionally performed by longshoremen covered by the the agreement. *Intercontinental Container Transport Corporation* v. *New York Shipping Association, Inc. and International Longshoremen's Association,* 426 F.2d 884, 887 (2d Cir. 1970). Pet. App. 39a-40a; A.614, 621.

Further Evolution of The Rules

The 1968 Rules did not diminish the siphoning of work away from the piers to the consolidators. To retain longshore work, the Rules had provided that any consolidated containers originating within a 50-mile radius of the port must be loaded or unloaded by ILA labor at the pier. A.246-248; 270-286. As the Rules evolved, this provision was a constant source of discord. Throughout the period

of the 1968-1971 contract, it became apparent that the automated carriers were failing to abide by the 50-mile rule. Pet. App. at 18a, fn. 56, A.613-618. Non-exempt containers were clandestinely returning over the piers*. This resulted in a resurgence of labor strife. A coast-wide strike took place from October 1, 1971 until enjoined under the Taft-Hartley Act at the end of November. In May, 1972 the ILA served notice that, unless violations of the Rules ceased, the union would invoke its right under the contract to abrogate them in their entirety and reassert its jurisdiction to stuff and strip *all* containers. Again in 1973 the industry was on the point of strike when the employers agreed to certain enforcement provisions known as the Dublin Supplement.** Pet. App. 17a-18a; A.264-269, 616-618.

By the Supplement, the employers agreed to prevent further evasion of the Rules by the sole remaining alternative—not to release their containers to known consolidators with facilities within 50-miles of the port. The Dublin Supplement was not a further set of Rules. It was only additional provisions for *enforcement* and *implementation*

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* This was accomplished by various subterfuges. Documentation was altered to make it appear that the containers had already been stuffed or stripped by longshoremen. Bills of lading were falsified to disguise consolidated loads as full-shipper-loads or as originating outside the 50-mile limit. Even bribery of key personnel was employed to avoid enforcement of the Rules. Pet. App. 21a; A.540-543, 589, 590, 591, 592, 593, 594, 631-635.

** The adoption of the Dublin Supplement did not put an end to labor unrest. In late March 1975 the ILA reopened the Rules contending that the carriers were not abiding by their contractual commitments. On April 28, 1975 the ILA invoked the renegotiation clause by suspending the Rules and began stripping all containers in all North Atlantic ports with the exception of full-shipper-loads. The present 1977 collective bargaining agreement was reached only after a major strike against container operators by longshoremen from Maine to Texas which lasted for more than two months in 1977. A.620-621.

of the Rules to effectuate their original intent, which circumstances had shown to be frustrated by the major automated carriers. The underlying meaning and purpose of the Rules, which both the NLRB and the Second Circuit had found to be to preserve and protect the work of longshoremen, remained the same. The Rules in their present development now form part of every ILA contract in 26 states in the eastern half of the nation, including the Ports of Baltimore and Hampton Roads.

Shortstopping

The premise of the Rules is that traditionally, longshoremen loaded *all* cargo onto and off of their employers' vessels. Pet. App. 14a, 48a-49a, 120a-121a, 139a-140a; A.109-114, 120, 134-135, 158, 168, 210-211, 229, 600-601. The Rules bargain away an express portion of that work, retaining the remainder to longshoremen. The Rules give up the longshoremen's right to stuff and strip *only* (1) FSL containers, wherever the owners' location, and (2) those LTL containers originating from or destined to a point more than 50 miles from the center of the port. The work of handling cargo in any other container is not relinquished. If the ocean carrier releases a container without pierside stripping or stuffing by its ILA employees and that container is stripped within the 50 mile radius of the port by other than its beneficial owner's employees, this constitutes a violation of the Rules. Liquidated damages, which progressively rose to $1,000.00 per container, are imposed for such violations.

The practice of "shortstopping" involves containers originally intended to be FSL. Truckers, for reasons of their own, received such containers at the piers, moved them to their local facilities within 50 miles of the center of the port, and unbeknownst to the ocean carriers and the ILA, proceeded to strip them and reload their contents into their own vehicles. Pet. App. 19a-20a, 22a-24a, incl. fns. 72 & 77;

A.28, 32-33, 35, 44, 53, 63, 66, 69, 73-74, 146, 185-186, 198-199, 302; Pet. App. 128a-129a, incl. fns. 18-22.* This violates the Rules in that, when a container is shortstopped within the 50 mile radius, it no longer falls within the two categories as to which—and *only* as to which—the ILA had agreed to forego its right to stuff and strip. A shortstop container which leaves the pier ostensibly as FSL loses that character when it is not delivered intact to the premises of the beneficial consignee where the goods would be handled by his own employees. A.215-217, 222, 225, 231-234, 421-439, 441, 442, 453-463.

In the earliest versions, the Rules made no mention of shortstopping. This was both because the practice had not yet become widespread and because such mention would be superfluous, since only FSL containers moving directly to the consignee were exempt from the ILA's continuing right to stuff and strip. Pet. App. 11a-12a, 124a-126a; A.40-41, 102-103, 122, 165-166, 180-182, 222-223, 231-234, 453-463. The truckers' practice of shortstopping later lead to express provisions in the 1974 CONASA/ILA contract. A.256, 280. But such articulation was only to clarify what

* Among the reasons advanced by the truckers were compliance with state and local safety regulations. Pet. App. 165a, A.184-186; Pet. B. 16 and the truckers' own economic benefit Pet. App. 128a-129a, A.68-70, 185-186, 192-193, 205-206; Pet. B. 16. The record points out the inherent weaknesses of the truckers' position. If, for reasons of safety, convenience or economy, the truckers did not wish a FSL container to proceed to its destination intact, it is undisputed that the redistribution of containerized cargo could as readily have taken place at the piers as at the trucking stations. Pet. App. at A.21, 89-90. Moreover, if safety was a factor, the truckers in many instances were in violation of safety and weight regulations even in the course of transporting the containers over city streets and state roads to their own off-pier facilities A.55, 184-185. Ultimately, the various rationales for shortstopping offer no reason for depriving longshoremen of their work. The desired results could be obtained by complying with the Rules without deceptively labelling as "FSL" containers which the truckers knew would be stripped within a few miles of the pier.

had always been the consistent understanding and practice of all parties concerned.*

Prior Litigation

In reliance on the rulings of the NLRB and the Second Circuit in the *ICTC* cases that the Rules were lawful work preservation, the parties refined them and added the Dublin Supplement. Since 1975 the Board has reversed its position and maintained in a series of cases that the Rules violate the secondary boycott and hot cargo provisions of the National Labor Relations Act.

In 1973 unfair labor practices were filed by two off-pier consolidators, in the Port of New York, Consolidated Express, Inc., and Twin Express, Inc., alleging that the Rules and their enforcement violated §§ 8(e) and 8(b)(4)(ii)(B) of the Act. These charges were tried and rejected by Administrative Law Judge Arnold Ordman, himself a former General Counsel to the Board. Judge Ordman held that the Rules had valid work preservation objectives within the doctrine enunciated by this Court in *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967) and recommended dismissal of the charges.

The Board overruled Judge Ordman. *International Longshoremen's Association (Consolidated Express, Inc.)* 221 N.L.R.B. 956 (1975). But it did not disturb his factual findings. Rather, it (re)defined the "precise work in controversy" to be that traditionally performed by the *con-*

* The record clearly shows that long prior to the adoption of express provisions with respect to shortstopping, the parties to the collective bargaining agreement, through their Container Grievance Committees, recognized that this practice violated the Rules. A.14, 19-20, 91, 106-107, 421-439, 453-463. Moreover, the truckers themselves were fully alerted that shortstopping was in violation of the Rules and subjected the ocean carriers to liquidated damages. A.65, 71-72, 74-75, 87, 207-209.

solidator's employees at their off-pier premises, which the Board held that the ILA was seeking to acquire.

On review, the Second Circuit by a divided panel deferred to the Board's definition of the work in controversy and sustained its decision. *International Longshoremen's Association* v. *N.L.R.B.*, 537 F.2d 706 (2d Cir. 1976), *cert. denied* 429 US 1041 (1977).* Judge Feinberg dissenting, argued that the Board's position was a clear misconception of the holding in *National Woodwork,* which requires the definition of the work in controversy to be the work sought to be preserved, i.e., that of the complaining employees (here the ILA longshoremen), the work preceding—not following—the introduction of the new technology.

During the pendency of the *Conex* case, two cases arose in the Ports of Hampton Roads, Virginia and Baltimore, Maryland, which ultimately gave rise to one of the Board's decisions now before this Court. In one case District Judge Robert H. Merhige, Jr. of the Eastern District of Virginia refused to issue an injunction under § 10(1) of the Act. *Humphrey* v. *International Longshoremen's Association,* 401 F.Supp. 1401 (E.D.Va. 1975), *rev'd* 548 F.2d 494 (4th Cir. 1977). ("*Humphrey I*"). He held that the Board's Regional Director did not have reasonable cause to believe that the Rules on Containers violated the provisions of the Act in that, as a matter of law, the Rules fell under the work preservation exception enunciated in *National Woodwork.* In a second case, District Judge Joseph H. Young of the District of Maryland, on the same set of facts that had been adduced before Judge Merhige, granted a preliminary injunction on the ground that the Rules might violate the Act. *Humphrey* v. *International Longshoremen's Association,* (D.Md. No. Y-75-1395, decided March 25, 1976) (unreported). ("*Humphrey II*").

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* Hereinafter both the Board proceeding and the Second Circuit's enforcement will be referred to as "*Conex*".

On December 20, 1977 a divided panel of the Fourth Circuit issued its decision on the Board's appeal from Judge Merhige's order. The Court reversed, finding that, in the light of the Second Circuit's holding in *Conex,* the Regional Director had reasonable cause to believe the Act was being violated. *Humphrey* v. *International Longshoremen's Association, AFL-CIO,* 548 F.2d 494 (4th Cir. 1977). Circuit Judge J. Braxton Craven, Jr. vigorously dissented, going to the substantive issue and finding that the Rules were work preservation on reasoning similar to that of Judge Feinberg's dissent in *Conex.*

The Proceedings Below

1. Associated Transport

This case arose from parallel incidents of shortstopping by Houff Transfer, Inc. and Associated Transport, Inc. in 1974. In each instance containers belonging to ILA employers and destined to a named consignee were picked up at the piers. The containers, ostensibly FSL, were delivered intact without ILA stripping. The trucker transported the containers not to the consignees but to its own trucking station within 50 miles of the port where it stripped the cargo from each of the containers and reloaded it into several vehicles. A.27-28, Pet. A.23a-24a, 155a-157a.

When the ILA learned of the shortstopping, it complained to the Container Grievance Committee which levied liquidated damages of $1,000.00 for each violation against the ocean carriers involved. Pet. App. 23a-24a, 153a-155a; A.303, 400-406, A.196-197, 401-402. Thereafter, the carriers, having paid the assessments to the STA-ILA Container Royalty Fund, requested indemnification from the truckers. A.305-311, 327, 328. When the truckers refused, the carriers cancelled their Equipment Interchange Agree-

ments and thereafter refused to release containers to them.* A.329, 340, 343-346. A.63-64, 403-405.

It should be pointed out that the Rules do not require, and the ILA did not insist, that the ocean carriers attempt to recoup their assessed damages from the offending truckers. See A.260-261, 284. The $1,000.00 per container assessment is liquidated damages imposed upon one contracting party in an attempt to make whole the other contracting party. The carrier's insistence that the truckers indemnify them for damages was at the carrier's own initiative, as was their subsequent decision to cancel the Equipment Interchange Agreements and refuse to furnish carriers to those offending truckers who declined indemnification.

In May, 1975, Associated Transport, Inc., Houff Transfer, Inc., and Tidewater Motor Truck Association filed charges with the Regional Director of Region 5 of the National Labor Relations Board alleging violations of Section 8(e) of the Act. 29 USC 158(e).

On August 19, 1976, Administrative Law Judge Wagman issued his decision and recommended order. In reliance on the Board's rationale and conclusion in *Conex,* that the employee unit at the off-pier facility was the relevant unit, he concluded that the respondents had violated the Act. On August 12, 1977 the Board, by divided panel, sustained his conclusions. *International Longshoremen's Association, AFL-CIO (Associated Transport, Inc.),* 231 N.L.R.B. 351 (1977), reversed and vacated Nos. 77-1735 and 77-1758 (D.C. Cir. September 25, 1979), Pet. App. 134a *et seq.*

2. Dolphin Forwarding

Dolphin Forwarding, Inc. and San Juan Freight Forwarding, Inc. are consolidators with facilities in the Port

* Houff's interchange agreements with other ocean carriers were not cancelled and Houff was therefore able to pick up their containers.

of New York. For some time they operated by the deception of falsifying documentation to make it appear that their containers were coming respectively from Massachusetts and Illinois. A.486, 484-485, 540-544, 583-585, 586, 589-594, 631-634. When it became apparent that they were engaged in consolidation activities within the proscribed 50 mile radius, the NYSA-ILA Container Committee assessed liquidated damages against NYSA members who had provided them with containers. Pet. App. 24a, 94a; A.479-480, 552-568. As a result, the carriers informed Dolphin and San Juan that they would no longer supply them with containers. Pet. App. 24a-25a, 94a.

On May 6, 1975 Dolphin filed charges alleging violations of the Act. 29 USC § 158(b)(4)(ii)(B) and (e). San Juan followed suit on May 7, 1975. Administrative Law Judge Henry L. Jalette concluded that the factual and legal issues in the case had already been dispositively determined in *Conex.* Consequently he issued a prehearing order striking all defenses, including that of work preservation A.576-580, and at the hearing completely precluded NYSA and ILA from adducing and developing any facts. A.485-487, 500-506, 516-518, 534, 541-544. In reliance upon *Conex,* he held that the Rules on Containers violated the Act. A three-member panel of the Board affirmed his decision, Pet. App. 90a-99a again on the strength of *Conex* stating:

> (T)he off-pier stuffing and stripping of containers was performed by consolidating companies and not longshoremen. Since the work was not traditional longshore work and had never been performed by longshoremen, the Rules . . . does not have lawful work-preservation object. (JA66). *International Longshoremen's Association, AFL-CIO (Dolphin Forwarding, Inc. and San Juan Freight Forwarders, Inc.),* 236 N.L.R.B. No. 42 (1978), reversed and vacated No. 78-1510 (D.C. Cir. September 25, 1979).

3. Judicial Review

Petitions to the U.S. Court of Appeals for the District of Columbia for enforcement and review of the decisions in *Associated Transport* and *Dolphin* were consolidated. On September 25, 1979, the Court, by a divided panel, refused to enforce the Board's decision on the principal ground that the Board had committed an error of law when it defined the work in controversy as that of the off-pier employees of the consolidators and truckers rather than the traditional on-pier work of longshoremen. The Board's Petition for Rehearing and Rehearing *en banc* was denied on December 13, 1979. On January 21, 1980, this Court granted the Board's petition for a writ of certiorari. A.635.

Summary of Argument

The Court of Appeals correctly held that the National Labor Relations Board's decision was premised on an error of law. The Board misdefined the work in controversy as that of the consolidators' employees off-pier rather than the dockside work of longshoremen, which had historically embraced the handling of all ocean cargo. By looking to the encroaching work rather than the threatened work, the Board made a finding of work preservation logically impossible and contravened the decisions of this Court in *National Woodwork Manufacturers Association* v. *NLRB,* 386 US 612 (1967) and *Houston Insulator Contractors Association* v. *NLRB,* 386 US 664 (1967).

The Board's decision is based on the correlative error of viewing containers as nothing more than big boxes. The Board overlooks the fact that it is a piece of maritime equipment, integral to the vessel, and owned by the ocean carriers, which functions as the cargo-bearing part of the ship, the work of loading and discharging which has always been performed by longshoremen. The NLRB disregards prior holdings of this Court which, in other contexts, have

recognized the true nature of the container as well as the effect of containerization on longshore work. *Northeast Marine Terminal Company, Inc.* v. *Caputo,* 432 US 249 (1977) and *P.C. Pfeiffer Co.* v. *Ford,*——US——, 62 L.Ed. 2d 225 (1979).

In urging that ILA employers have no right of control over the work in controversy, petitioner seeks to sustain the Board's decision by argumentation. The Board has never before addressed this issue, much less found an absence of right of control. Its present argument is premised on the Board's fundamental, erroneous definition of the work in controversy as that of off-pier consolidators' employees. It rests upon the further fallacy that the right of control rests with customers, who in fact are not benefited and who have no interest in whether the goods are consolidated at the pier or at a point slightly inland. To sustain right of control, the Board raises the question of the validity of the Rules on Containers under various other statutes, which issues have never been judicially decided. This approach would create a veritable whirlpool of litigation where a finding of validity under the Labor Management Relations Act would have to await determinations under various other statutory schemes, prolonging any resolution *ad infinitum.*

That ILA employers have the right to control the work as properly defined is evident from the fact that the containers belong to them. The Rules are no more than a contract between an employer and his employees as to the use of the employer's own equipment. At one point, all containers are at the piers and in the custody of ILA employers. Nothing prevents the employer from assigning to longshoremen the task of stuffing and stripping them. That power remains notwithstanding the past or subsequent actions of third parties. Control is not diminished by the fact that the Rules exempt certain containers from being subject to its exercise. The vessel

owners' right of control is not abnegated when it is frustrated by the deceptive practices of consolidators or truckers, nor is it affected by the means taken by the parties to insure its proper exercise.

The argument that, even if the Rules on Containers are validly work preservative, the ILA has abandoned the work is not pressed even by the Board. The NLRB rulings under review were not based on a finding of abandonment. The argument is controverted by the royalty on each exempt container by which the ILA asserts its continuing jurisdiction over the work. It further misunderstands that longshoremen once handled all ocean cargo and what they did not exempt by the Rules, they have retained. It is based upon a completely inapposite decision in *Pacific Maritime Association* v. *NLRB,* 515 F.2d 1018 (D.C. Cir. 1975), *cert. den.,* 424 US 942 (1976) ("Cal. Cartage"), which no court has held to be controlling. Finally, the abandonment argument overlooks the recapture and fairly claimable doctrines under which the ILA could reassert any jurisdiction it might have given up.

The doctrine of work preservation has been recognized by this Court as the will of Congress. It performs a useful, social function in softening the impact of technological change on the livelihoods of workers throughout the nation. Its abandonment now would usher in a period of crippling labor strife. For these reasons, the Board should not be permitted to vitiate the doctrine of work preservation by invoking a legal test which precludes it.

Nor should the Board be permitted legally to redefine the work in controversy (and so control the result) on a case-by-case basis. Such discretion would undercut the rulings of this Court and frustrate the will of Congress. It would subject parties not only to the invalidation of their contracts but to serious pecuniary liability, all at the whim of the agency. The results would become so arbitrary and unpredictable as to make collective bargaining negotiations

impossible. Administrative *fiat* would replace private negotiations as the determinant in labor relations at the expense of collective bargaining in the private sector which is the cornerstone of our labor policy.

POINT I

The Board committed an error of law by misdefining the work in controversy as that performed off-pier rather than that traditionally performed by longshoremen in the handling and distribution of ocean borne cargo.

To decide whether the Rules on Containers fall under the work preservation doctrine enunciated by this Court in *National Woodwork Manufacturers Association* v. *NLRB,* 386 US 612 (1967) as a Congressional exception to the "hot cargo" and secondary boycott provisions of the Act, one must first define the "precise work in controversy". The Board is in error in that it fails to define the work in controversy as that traditionally performed by longshoremen at the pier before the advent of containerization.

A. The Issue Is Exclusively One of Law.

For the first time in all the litigation engendered by the Rules, the Board in this proceeding attempts to characterize its ruling as a finding of fact. This is a transparent attempt to insulate itself from judicial review. It is unavailing in the light of the record, the previous litigation, and the Board's own prior position.

That the issue is one of law is most conclusively established by the absence of any disagreement about the facts. The controversy is not about what happened in the real historical world, but only how those events shall be characterized and interpreted, which depends upon what

legal principles are applied. This is most clear with respect to the Board's determinative finding in each case that longshoremen never performed the work in controversy. On the surface, this would appear to be a factual conclusion. But even the ILA would agree with it if "the work in controversy" is defined, as the Board defines it, to be solely the off-pier activity of truckers' and consolidators' employees after containerization occurred. No one contends longshoremen ever did that. On the other hand, if the work in controversy is defined as the loading of the cargo into the part of a vessel designed to hold such cargo, even the Board would admit that the longshoremen have always performed that work.

Defining the work in controversy does not involve the fact finding process simply because it is a matter of *definition.**

Thus, the widespread judicial cleavage generated by the Rules has turned on and consistently been recognized as a disagreement on the law. In the first instance, the Board overruled the recommendations of its Administrative Law Judge in *Conex,* all the while accepting his factual findings, but changing his definition of the work. On review, the Second Circuit expressly recognized that;

> There is no dispute as to the objective facts in this case. The record is unambiguous .... 537 F.2d at 708.

Judge Feinberg dissented precisely:

> because the Board committed an error of law by focusing on the wrong "work" .... 537 F.2d at 714.

In the two injunction proceedings generated by the charges of Houff and Associated Transport, both district

* As pointed out below, how "the work in controversy" should be defined is mandated by the laws of logic and the will of Congress and the prior decisions of this Court. But these are legal, not factual considerations.

judges found no issue of fact.* On the appeal in *Humphrey I,* the Fourth Circuit split without disagreeing on the facts. Judge Craven dissented on the ground that:

> the work to be preserved is the loading and unloading of ships .... Twenty years ago the longshoremen had it all. Now they seek only to retain a part of it. *Humphrey v. ILA,* 548 F.2d 494, 500-501 (4th Cir. 1977).

Finally, the District of Columbia Circuit below expressly accepted the Board's findings of fact but refused enforcement by reason of the Board's error of law, saying:

> Like the petitioners and the other circuits, this court has no dispute with the Board's factual findings. Rather, our conflict with the NLRB is exclusively focused on the Board's misinterpretation and misapplication of the prevailing law—the doctrine of work preservation.

Indeed, not until that court refused to sustain the Board's rulings because of their legal error did petitioner resort to masquerading that error as a finding of fact, so as to invoke the "substantial evidence" standard of review. In its brief to the Court of Appeals in *Dolphin,* the Board was more forthright. It recognized the issue as a matter of definition but claimed that the right to define "lies 'within its discretion' ". (Respondents brief in No. 78-1510 below, p.16).

Since the objective facts are not in dispute and there is unanimous judicial agreement that the issue is one of law, the Court of Appeals correctly refused to sustain the Board's rulings which it found to be based upon

* Judge Merhige found that the Rules were work preservative as a matter of law. *Humphrey* v. *ILA,* 401 F.Supp. 1401, 1407 (E.D. Va. 1975). Judge Young said "the facts themselves are not in dispute" but declined to find a valid work preservation object as a matter of law. *Humphrey* v. *ILA,* (D. Md. No. Y-75-1395, March 25, 1976).

errors of law. *NLRB* v. *Babcock & Wilcox Co.*, 351 US 105, 112 (1966); *NLRB* v. *Brown*, 380 US 278, 290-292 (1965); *SEC* v. *Chenery Corporation*, 318 US 80, 94 (1943).

B. The Board Misconstrued the Law of Work Preservation.

The Board's error is its definition of the work in controversy as that performed off-pier *after* the advent of containerization by employees of consolidators rather than that historically performed dockside by longshoremen. That the Board in fact does so premise its case permeates its decisions and arguments. In *Conex, supra,* the Board expressly found:

> . . . that the on-pier stripping and stuffing work performed by longshoremen as an incident of loading and unloading ships does not embrace the work traditionally performed by (the consolidators) at their own off-pier premises. (221 N.L.R.B. 956 at 960)

As petitioners' brief admits: "(I)n the *Dolphin* proceeding, the Board followed its decision in the *Conex* case".

In *Associated Transport,* the Board said:

> . . . (I)t is not important what type of enterprise was doing the work; rather, what is important is that the Respondents' members here, as in *Consolidated Express,* had *not* historically done the work." (231 N.L.R.B. 351; Pet. App. 116a) (emphasis in original)

In its brief to this Court, petitioner does not make a forthright statement of its definition, but it is implicit in all its arguments*. Petitioner's brief goes so far as to

* The Board's definition is manifested especially by petitioner's constant use of descriptive phrases to modify the word "work", such as "off-pier," "at inland terminals," "at off-shore terminals," "at inland facilities." Such language, of course, would be impossible if the Board were looking to the on-pier work of longshoremen.

claim the Court of Appeals "has misapprehended the work in controversy" when it looked to the tradition of longshoremen (PB, p.46).

In effect, petitioner asks the courts to view the drama starting in the third act. It focuses on a point in time when containerization has already begun and the loading work of consolidators' employees, theretofore non-existent, has already been created. This ignores two previous stages: when longshoremen did all the work of loading and unloading ships and when containerization was introduced and shifted that work away from them. By making the new work created by containers its yardstick to determine work preservation, the Board committed reversible error of law.

In *National Woodwork, supra,* which all parties agree is controlling, this Court held that the "will not handle" prefabricated doors provision of the carpenters' contracts was valid as work preservation, saying:

> . . . substantial evidence supported the finding that the conduct of the Union on the Frouge jobsite related solely to preservation of the traditional tasks of the *jobsite carpenters.* 386 US at 646 (emphasis supplied)

In a companion case, *Houston Insulation Contractors, supra,* the Court likewise looked to the work of the union whose collective bargaining agreement was challenged, saying:

> (T)he conduct complained of herein was taken to protect . . . a deprivation of work its object being to protect or preserve for employees certain work customarily performed *by them.* 386 US at 665. (emphasis supplied)

In both cases this Court looked to the work of the employees whose union was charged with violations of

the Act, *not* to the work of the innovators' employees*. In *National Woodwork,* the Court quoted the opinion of the Trial Examiner as follows:

> I am convinced and find that the task of cutting out and fitting millwork, including doors, has, at least customarily, been performed by the carpenters *employed on the jobsite.* * * * The provision guards against encroachments on the cutting out and fitting work of the contract unit employees who have performed that work *in the past.* Its purpose is plainly to regulate the relations between the general contractor and his own employees and to protect a legitimate economic interest of the employees by preserving *their unit work.* 386 US at 618 (emphasis supplied)

Such an approach is mandated by both law and logic. Logically, to define the work in controversy as that later performed by the employees of the innovators preordains the result and makes further inquiry unnecessary. It precludes any possible finding of work preservation. As a practical matter, there will always exist a later tradition of the innovators' employees doing certain work. Unions do not engage in activities to preserve work and cases do

* The Board's approach in this case also represents a marked change of position by the NLRB itself. In all other work preservation cases, the Board has correctly looked to the work to be preserved. See, *Houston Insulaior Contractors Association* v. *NLRB, supra; Sheet Metal Workers International Association Local 223* v. *NLRB,* 498 F.2d 687 (D.C. Cir. 1974); *Local 742 United Brotherhood of Carpenters and Joiners* v. *NLRB,* 444 F.2d 895 (D.C. Cir. 1971), *cert. denied* 404 US 586 (1971); *Canada Dry Corp.* v. *NLRB,* 421 F.2d 907 (6th Cir. 1970); *American Boiler Manufacturers Association* v. *NLRB,* 404 F.2d 547 (8th Cir. 1968), *cert. denied* 398 US 960 (1970); *NLRB* v. *Local 164, IBEW,* 388 F.2d 105 (3d Cir. 1968); *NLRB* v. *Local 28 Sheet Metal Workers International Association,* 380 F.2d 827 (2d Cir. 1967). Even with respect to the Rules on Containers, the Board's General Counsel in *ICTC, supra,* and its Administrative Law Judge in *Conex, supra,* employed the correct definition.

not arise until a concrete threat poses itself. The issue is whether the work was the union's to begin with, not whether the others had later begun to do it.

The question in deciding work preservation must be: what is the work *to be preserved?* This, in the very language of the doctrine, must be the pre-existing work of the original union, the threatened work, the work whose existence is now in jeopardy. One must look to it and see whether or not it is being siphoned away, destroyed, or displaced by the activities against which the challenged provision is directed.

The test employed by the Board, then, is tautological: whether the innovators have been doing the work the innovators have been doing? Of course, they have. This makes a finding of a work preservative motive by the threatened union impossible *a fortiori.* It literally writes out of the law the doctrine of work preservation, which this Court has expressly recognized and upheld as the will of Congress.*

On this proceeding, petitioner does not forthrightly ask the Court to overrule *National Woodwork,* but pretends that the Board's decision falls within the doctrine enunciated there. The credibility of this posture is undercut by the appearance herein as *amici curiae* on the side of the Board of the very parties whose position this Court rejected in *National Woodwork.*. Its fallacy is apparent if one applies the Board's present approach to the facts of *National Woodwork* itself or its companion case.

* The inevitability of this result was recognized at the outset by Administrative Law Judge Ordman when he wrote in *Conex*:

> Indeed, the legitimacy of a work preservation objective would be virtually precluded in any situation where it could be established that other employees at other sites were doing or had done the work for which protection was being sought. 221 N.L.R.B. at 974.

In *National Woodwork,* the employees of the door manufacturers were already engaged in the work of prefabricating doors at the time the carpenters refused to install them. Had this Court looked at the work of the door manufacturers' employees (performed at the latter's plant) and defined that as "the work in controversy", it could not have found a valid work preservation motive in the carpenters' "will not handle" rule. Similarly, in *Houston Insulation Contractors* v. *NLRB,* 386 US 664 (1967), had the Court looked to the work of the employees of the manufacturers to whom the work was contracted out, it could never have found a valid work preservation motive in the union's insistence that the work not be contracted out.

Indeed, under the Board's approach, no work preservation clause can have legal validity, not even those which have already been held to be valid. Contrary to the Board's approach, the controlling precedent of *National Woodwork* requires that the validity of a work preservation clause be determined by defining as the "work in controversy" that work which the clause seeks to protect. To do otherwise, as the Court of Appeals held, is clearly an error of law.

POINT II

The Board misconceived the essence of containerization—an innovative technology that reduced longshore work.

At the core of the Board's misdefinition of the work in controversy is a fundamental misconception of the nature and importance of containerization. Significantly, the Board's decisions cavalierly discount the unassailable fact that containerization was an innovative process which *took work away* from longshoremen. The Board views the container as nothing more than a big box. It deals with the container as simply a more advanced method of packaging cargo, as though it were part and parcel of the merchandise transported.*

A. The Nature of Containers

One's whole approach to the issues in this litigation is colored by one's perception of the container. If one adopts the Board's "big box" approach, it is easy to dismiss the ILA's claims of work preservation with the observation that longshoremen have always transported packages of varying sizes to and from ships and this is just a bigger package, so where have they lost?

This over-simplistic approach is, of course, belied by the economic statistics, which indisputably show a market decline in longshore labor opportunities directly correlative to increasing containerization. The answer to what ILA has lost by reason of containers is measurable in manhours and dollars and cents. Beyond that, however, the "big box" approach misconstrues the nature of containers.

That the container is not part of the cargo is apparent from both technical and legal considerations. Technically, the container functions as part of the ship to which it is physically attached and becomes a component. Unlike ordinary receptacles, a container can be affixed only to a ship specifically designed to carry it and physically compatible with it. Containers cannot be used indiscriminately on any vessel.

Legally, the containers in these proceedings are *the property of the owner of the ship,* the longshoremen's employer, not of the shipper or the consignee of the goods and certainly not of the consolidators who transport them.

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* The dissenting member of the Court of Appeals, Judge Robb, fell squarely into this error, saying:

> "I am not impressed by the fiction that a container is part of the hold of a ship; if it is, than so is any large box in the hold of a ship." (Pet. App. 82a)

Thus, unlike the boxes, cartons, drums and bags in which goods of various kinds are packaged for break-bulk shipment, which do belong to those utilizing the vessel's facilities, the container is not a part of the goods transported. Rather, it is an integral part of the maritime transportation system.

The impact on longshoremen's work of this automation of their employers' equipment is undeniable. All the foot-pounds of labor, all the manhours of work which once had to be expended on moving the cargo from the hold of the ship onto the dock and thereafter into the van of the truck have been done away with. Those foot-pounds and manhours of work lost by the transformation were historically those of the ILA membership. Thus, the union correctly perceived containerization as a threat to the work of its members and rightfully objected to containerization for the singular motive of work preservation.

B. The 50-Mile Rule

The fact that the movable container is the equivalent of the hold of a ship created the possibility of establishing surrogate docks within a short distance of the piers. To prevent this, the fifty-mile radius was imposed.

Its purpose is both obvious and critical. The thrust of the Rules was to permit employers and their customers to take advantage of the technology of containers while at the same time minimizing the destructive effects on the work opportunities of longshoremen at the docks. To permit the transfer of goods to be interrupted at a point approximately one hour short of the docks, where they would then be loaded into the functional equivalent of the hold of a ship, would be in effect to extend the docks fifty miles inland (or, as in *ICTC,* across the street from the piers). For the bulk of their journey, the goods would

have traveled piecemeal, enjoying none of the benefits of the new technology. The only purpose and effect of not permitting them to continue over the few additional miles to the piers would be to shift from the piers to a nearby point the work of loading these goods, with the concomitant result of transferring it from the longshoremen who had traditionally performed it to other labor.

Throughout their briefs, the Board and its allies seek to cloak their position in the halo of the public interest. The above considerations show this for the canard it is. Where the consolidators operate within 50 miles of the pier, the goods will be subject to all the hazards of going astray, breakage, or pilferage for the great part of their journey. The shippers of goods have no interest whatsoever in whether their cargo is containerized an hour or so sooner or later. Similarly, shortstopping is for the benefit of the truckers, not their customers, who are indeed charged extra if they wish to avoid it (PB, p. 15). The Board's appeal to the rights or preferences of shippers wishing to take advantage of consolidation is pure fiction. Consolidation in violation of the Rules confers no benefit whatsoever on the customer. It only shifts the dock slightly farther inland. It makes no contribution to progress, for it does not take real advantage of the technology. Shortstopping actually subverts that advantage. The Rules, on the other hand, permit the real technological value of containerization to be realized by carriers and shippers alike and prevent only its prostitution to deprive longshoremen of work they have always done and still can do.

To discourage this egregious, deliberate diversionary tactic by the automated carriers and their customers, and to prevent the loss of such work, the Rules provided that all containers consolidated within the fifty-mile radius must be stripped or stuffed at the docks by longshore labor.

Respondent ILA is well aware of the distaste generated by the stuffing and stripping provision of the Rules. Petitioner's brief described them by the pejorative, "make-work". (PB, p. 52) This is misleading in light of the

underlying realties. The work of longshoremen is not new. It "outruns history". Under the Rules they do nothing they have not done from time immemorial. Rather, it is the work of the *consolidators'* employees (which interrupts the flow of goods just short of the docks and places them in container-holds, just as the longshoremen otherwise would do about one hour later) which is the "make-work". It is consolidation within fifty miles of the port that is the unnecessary intrusion into the traditional transportation process.

This point is even clearer on import, where longshoremen strip and restuff inbound containers, which are then moved by truck for less than an hour and restripped, sorted and distributed to individual recipients by the consolidators' employees. It is the consolidators' and truckers' insistence that the containers be restuffed for movement to their sheds—instead of the goods being sorted and loaded onto trucks at the dock as had always been done—that interjects the "make-work".

The Rules, then, recognized that the establishment of surrogate docks less than fifty miles away from the port was not a genuine utilization of the new technology. It abused and distorted the character of the container as a piece of maritime equipment. It served as a medium to transfer still necessary work from one group of employees to another. Consequently, containers consolidated or deconsolidated wtihin fifty miles of the port were not among those which the ILA exempted from its traditional right to handle. As hammered out at the collective bargaining table, the Rules permit every party to reap the benefit of technology, *except* the benefit of transferring the same work from ILA members to cheaper labor.

C. Judicial Precedent Has Correctly Characterized the Container.

The correct characterization of a container not as a method of packaging but as the functional equivalent of the

hold of the ship has not escaped judicial recognition. In *Northeast Marine Terminal Company* v. *Caputo,* 432 US 249 (1977), *affirming Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F.2d 35 (2d Cir. 1976), this Court made just such a determination precisely with respect to the work of longshoremen in relation to the coverage under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). The Court had to determine, initially, whether two employees were engaged in maritime employment (i.e., to decide whether their activities in relation to the handling of containers were truly "longshore work"). It said:

> In effect, the operation of loading and unloading has been moved shoreward; the container is a modern *substitute for the hold of the vessel.*. As Judge Friendly observed below, "Stripping a container . . . is the functional equivalent of sorting cargo discharged from a ship; *stuffing a container is part of the loading of the ship* even though it is performed on the shore and not in the ship's cargo holds." * * * 432 US at 270-271 (emphasis supplied)
>
> Congress' intent to adapt LHWCA to modern cargo handling techniques clearly indicates that these tasks, hithertofore done on board ship, are included in the category of 'longshoring operations'. 432 US at 271.

In a footnote the Court said:

> The work of longshoremen, the loading and unloading of cargo remains the same; only the procedure and the place of performance (have) changed. 432 US at 270, n. 32

Moreover, the Court emphasized:

> Until the container was stripped, the loading and unloading process was clearly incomplete. The only geographical concern Congress exhibited was that the

> operation take place at a covered situs. * * It was precisely Congress' intent to accommodate the mobility of containers and the ability to transport and strip them at locations removed from the ship. 432 US at 271, n. 33

The Court discounted an argument based on a "point of rest" theory because *inter alia*:

> . . . the theory fails to accommodate the intent to cover those longshoring operations that modern technology had moved onto the land. Coverage that stops at the point of rest excludes those engaged in loading and unloading the *modern functional equivalent of the hold of a ship.* As we have indicated, Congress clearly intended to cover such operations. 432 US at 276 (emphasis supplied).

In *Caputo,* this Court recognized the right of a longshoreman to benefits under the LHWCA for any injury in connection with the movement of containers precisely *because* those containers are the functional equivalent of the longshoremen's traditional work. Ironically, under the NLRB's decision, the same longshoreman is not entitled to have his union bargain with his employer to preserve his rights to load and unload those same containers because, it is said, this is the traditional work of the consolidators' employees.

Thus, this Court has already recognized the nature of the container as urged by respondents.* Granted that the

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* The true nature of the container was earlier recognized in an entirely different context. In *Leather's Best* v. *S.S. Mormaclynx,* 451 F.2d 800 (2d Cir. 1971), an admiralty proceeding, the matter was purely one of contract law and the limitation of an insurer's liability of $50 per package. The Second Circuit expressly rejected the "big box" theory of the Board in this case and held that the container was "functionally a part of the ship." *Id.* at 815.

law is full of anomalies, the ILA respectfully submits that such recognition indicates a reality, not a judicial fiction. Although the Board attempts to sweep aside the *Caputo* holding as arisng in an entirely different context, it fails to overcome the fact that, for this Court to come to the legal conclusion it did, it had to make a characterization of "the container" in the real nature of things, a characterization, which is equally applicable to and dispositive of the case at bar.

* * *

In summary, the Board's refusal to recognize, as the courts have, that the container is the cargo-bearing part of a ship, which has always been serviced by longshoremen, leads it to make a false distinction based upon where the work is done. By focusing upon inland sites and defining the work in controversy to be that of employees there the Board makes a finding of work preservation by the ILA impossible. This directly contravenes the holding in *National Woodwork, supra.* The Court of Appeals was correct in identifying this error of law, and its decision should be affirmed.

POINT III

Longshoremen's employers have right of control over the work.

In an effort to salvage the Board's decision, petitioner and its allies invoke the doctrine of "right of control" approved by this Court in *NLRB* v. *Enterprise Association of Steam Pipefitters,* 429 US 507 (1977). The argument has a fundamental weakness. As the Court of Appeals below noted, right of control played no part in either of the Board's decisions now before the Court. Nor was this ground urged by the Board in *Conex* or in any other of its decisions with respect to the Rules. The argument is plainly something concocted for purposes of the instant

proceeding. The Board urges here as an adversary litigant something it never espoused in its fact-finding or adjudicatory role.

That for seven years in a plethora of litigation the Board has never raised lack of control on the part of ILA employers strongly indicates the disvalue of that test to invalidate the Rules. Respondents suggest that the Board has never raised the right of control for the reason that it is self-evident that ILA employers do have the right to have their own employees work on their own equipment.

Initially, petitioner's argument suffers in that it is premised on the Board's fundamental error in this case—the misdefinition of the work in controversy. One can find lack of control of the work only if one defines the work to be that of the innovators' employees off pier. The Board implicitly admits this. (PB, pp. 28, 46). It is forthrightly admitted by the *amicus* brief of National Woodwork Manufacturers, *et al.* at p. 16. If, then, as demonstrated in Point I hereof, pp. 21 through 28, *supra,* the Board initially erred in definition of the work in controversy, the entire premise of its lack of control argument likewise falls.

The Board urges that there exist two different economic markets, one of goods sent directly to the piers and one of goods moving through consolidators. This is a fiction of the Board's own devising. The only market here is the overseas shipment of cargo. Ultimately all goods arrive at the piers, whether their route be direct or through freight forwarders, or through consolidators. Historically, longshore employees of the vessel owners handled all these goods. Consolidators are freight brokers, middlemen. They do not lose that character because vessel owners make containers available to them. Shippers and consignees remain the customers of the shipping companies, and their ultimate interest remains in the ocean transport of their goods.

Shippers do not control the work. The notion that for longshore employers to continue to have their own employees handle the cargo violates the contractual rights of shippers is untenable. Whatever may be the case of containers consolidated well inland, it is manifestly untrue to claim that shippers have any concern over whether their goods are stuffed or stripped at the piers or somewhere else within the 50 mile radius. In either case, all the benefits of containerization extolled by the Board simply do not apply. Shippers utilize pier-adjacent consolidators for purposes of assembly and routing, as they once utilized freight forwarders—not out of any desire to have the goods stuffed or stripped an hour sooner or later.

Moreover, such a desire would not take precedence over the rights of vessel owners. A carrier's customers have the right to have their goods transported, not to dictate the internal work policies of the shipping lines. They no more have the right to say who shall load or discharge the carrier's containers than they would to insist that breakbulk vessels be serviced by labor of their own choosing. Once again, the correct characterization of the container as the cargo bearing part of the vessel lays to rest the Board's error.

The suggestion that ILA employers are precluded by law from permitting their own employees to work on their own equipment is a patent circular reasoning. No court has held that the Rules violate the anti-trust laws or the Shipping Acts. With respect to the former, the Second Circuit in *ICTC, supra,* held the opposite. The decision of the Third Circuit in *Consolidated Express, Inc.* v. *New York Shipping Association, et al.,* 602 F.2d 494 (3d Cir. 1979), that there *may* be a violation rested upon the premise, unchallengeable in that case because of collateral estoppel, that the Rules violate the LMRA. Indeed, in its brief to this Court as *amicus curiae* on the ILA's and NYSA's petition for writs of certiorari to the Third Cir-

cuit (Nos. 78-1902 and 78-1905) the Board urged this Court to defer consideration of the anti-trust case until it decided the labor aspects in the case at bar. To now urge that the validity of the Rules under the labor act turns on the anti-trust aspects is a complete reversal of position and a plain case of bootstrapping.

Similarly, the decision of the Federal Maritime Commission that the Rules violate the Shipping Acts, 46 USC § 801 *et seq.*, 46 USC § 843 *et seq.*, has never been confirmed by any court. Nor will the ILA, which is not subject to the Shipping Acts, attempt to argue that case *de novo* before this Court. What is now to be decided is the validity of the Rules under the LMRA. Whether or not they impinge upon any other statutory scheme must be decided in other litigation. To subsume into this case, via right of control, those other issues would be to create a Catch-22 situation, wherein lawsuit after lawsuit would have to be stacked in a holding pattern and no definitive decision reached under any law until the last administrative agency or plaintiff had his say.

When one looks at right of control in a labor context, the answer is as self-evident as the Court of Appeals found. Only containers which are the property of ILA employers are covered by the Rules. It is fundamental that an employer has the right to assign to his own employees the work on his own equipment. Conversely, a union bargaining with its own employer over the use of his property is engaged in preeminently primary activity. It need not be belabored that, if the activity is primary, the fact that it has even disastrous effects on other parties does not make it unlawful.* *National Woodwork,*

* Contrary to the Board's assertions, the Rules do not require carriers to cease doing business even with known violators. The only requirement is that the consolidators not be furnished the carriers' containers. They may still consolidate containers of their own procuring, and these will be handled intact. Or, they may bring goods to the pier breakbulk as was the practice before containerization.

supra, 386 US at 632. See also, *NLRB* v. *The Fruit and Vegetable Packers and Warehousemen Local 760,* 377 US 58 (1964).

Nor have ILA employers ever given up or contracted away their right to give the work to their own employees. An examination of the Equipment Interchange Agreements between the vessel owners and motor carriers, as well as of the delivery orders and bills of lading, shows that they did not grant a right or license to the truckers to rehandle or tamper with the cargo in the containers. Stuffing and stripping are and remain activities incident to the handling of the cargo, not of the containers. It is equally clear that the concept of "legal responsibility" contemplated by the interchange agreements in no way involves the merchandise and is a term of general trucker liability for damages to the ocean carrier's equipment.

The Board and its supporters' reliance on the right of control aspects of *National Woodwork Manufacturers Association* v. *NLRB,* 386 US 612 (1967) and *NLRB* v. *Enterprise Association of Steam Pipefitters,* 429 US 507 (1977) cannot stand scrutiny. The factual situation in those cases both involved obvious subcontracting situations, not easily analogized to the peculiarities of the instant case.* But a comparison of the respective situations is illustrative in dispelling the Board's argument.

The carpenters' employer in *National Woodwork* was purchasing prefit doors, which had the effect of doing away with the work of fitting blank doors traditionally

* For all intents and purposes, the vessel carriers making their containers available to pier adjacent consolidators and giving them a preferential rate for stuffing and stripping them is indistinguishable from subcontracting out the work of longshoremen. But, in this case, the vessel carriers are the prime contractors, the consolidators the subcontractors. Obviously, right of control lies with the former. The Rules specifically forbid subcontracting, and even the Board recognizes that this is lawful (PB, p. 37).

performed by carpenters at the construction jobsite.* This Court found a valid work preservation objective even in that circumstance. If, in *National Woodwork,* the carpenters' employer had already purchased and owned uncut doors, which it then sent out to the manufacturer's factory to be prefit, the finding of work preservation would have been even more readily made. It would have been based on the fact that the employer was subcontracting out the carpenters' fitting work. This is precisely the fact pattern in the case at bar. The union's employers are sending out their property (blank doors/containers) to be worked on (fitted/loaded) at an outside (manufacturer's/consolidator's) facility by employees other than the employers' (carpenters/ILA longshoremen).

In *Pipefitters,* the arrangement was the purchase and installation of already completed units ordered by the general contractor, not by the subcontractor/employer. The analogy here would be if the subcontractor in *Pipefitters* was authorized to provide the units, which he owned, and attempted to send them out for assembly by off-site workers.

Ascertaining the right of control is a test to aid in determining the basic question of whether or not a union's activity is primary or secondary. *Pipefitters, supra,* 429 US at 521-528. Where, as here, the activity is quintessentially primary—bargaining with one's own employer over the use of his equipment—the test is unnecessary and redundant. To apply it is almost to state the obvious.

As all parties agree, ascertainment of right of control depends upon definition of the work in controversy. If the doctrine of work preservation is to survive, the work in

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* It need hardly be noted that, if in *National Woodwork,* this Court had defined the work in controversy as that of the door manufacturers' off-site employees (the analogue to the consolidators' employees here), Frouge would have had no right to control that work, and the result would have been different.

controversy must be the threatened work, here the pierside stripping and stuffing of the ILA employers' containers. There is no question that ILA employers control that work. The containers are at the piers and belong to the vessel carriers. Whatever may happen before or after, the longshore employers can have their employees load or unload the cargo at the docks. This is true on import whether or not a trucker or consolidator may request that a container be reloaded so that they may later restrip it at their facilities. It is equally true on export whether or not a consolidator may have already engaged in extraneous stuffing. While the carriers' containers are in the carriers' possession, no law or practical constraint prevents the carrier from having its employees stuff or strip it.

The Rules require nothing more. The ILA is concerned with preserving for its members the work they had always. If a trucker or consolidator wishes to stuff or strip a particular container twenty times in addition to the longshoremen's performance, this would be of no concern to the union and would not violate the Rules. The Rules, then, do not prevent third parties from doing anything. They only guarantee that longshoremen do once at the piers the work that their employers can give.

The problem arises from the fact that, in the interest of progress and under the auspices of federal mediation, the ILA agreed to relinquish its right to handle the cargo carried in certain specified containers. It is a problem only because the exempted containers are characterized by their subsequent or future history, i.e., containers going directly to or from a beneficial owner or containers consolidated outside the 50-mile limit, and that history is subject to falsification.

ILA employers control all the work at the piers. They could have longshoremen strip and stuff every container there. But the ILA does not insist on that. It is only the deception of the consolidators and truckers, who make it

impossible to know whether or not a particular container is within the exempt class, that interferes with the exercise of the vessel owners' right to give his employees the work they have retained. If a carrier knows that a container has been unnecessarily stuffed within 50 miles of the port by a consolidator or that it will be shortstopped within 50 miles by a trucker, he can have his longshoremen handle the cargo within. But, when the character of the container is disguised by silence or false documentation, he is frustrated from exercising that right. The frustration is practical, not legal.

Given the duplicity, only two alternatives are open to the vessel owners wishing to exercise effectively their right to assign their employees the work pursuant to their contract. Either the right must be exercised with respect to all containers or the deception must be ameliorated. The Rules as they have evolved chose the less drastic alternative. Instead of the ILA's reasserting its right to strip all containers, deception was discouraged by the imposition of liquidated damages on containers stripped in violation and by the withholding of containers from consolidators who were known violators of the 50-mile provision and whose facilities within the radius could have no other function.

These enforcement mechanisms in no way alter the right of control. Once it is admitted that the vessel owners had the right to assign the work of stuffing and stripping at the piers, the primary objective of the Rules to preserve that work for longshoremen is established. The actions of the carriers, whether contractual or unilateral,* are only to protect, preserve, and exercise their right of control as they have bargained to do.

Application of the right of control test, then, further demonstrates the primary nature of the Rules' objective

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* As in the case of demanding reimbursement from offending shortstoppers, which is not required by the Rules.

and is added reason to sustain the holding of the Court of Appeals.

POINT IV

The Board's decision cannot be sustained on a theory of abandonment.

Intervenor Houff Transfer, Inc. persists in the argument that, even if it be held that the Rules have a valid work preservation purpose, the ILA had abandoned any right its members may have had to stuff and strip containers. (Houff's Brief, p. 27 ff). The abandonment argument is no longer a serious issue. It was given short shrift by the Second Circuit in *Conex, supra,* 537 F.2d at 712. It formed no part in the NLRB decisions now under review. It has not been urged to this Court by the Board.

Abandonment cannot be supported by the record in evidence. From the start, the Rules contained provision for a royalty to be paid on each container the right to stuff or strip which was bargained away. This royalty was in recognition of the ILA's jurisdiction over the work of handling the contents of such exempt containers. The royalty has never been waived or deleted from the Rules. Thus, the uncontroverted record shows an uninterrupted claim by the ILA to all of its members' historic work. Under the Rules, that claim is satisfied in some instances by continuing to perform the actual work, in others by payment of the royalty.*

If it be true that the ILA contracted away the right to service FSL containers, those shortstopped within 50 miles

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* As the word itself denotes, the "royalty", as in other legal areas like patents and licenses, indicates a proprietary or other right to exclusivity with respect to the item on which the royalty is paid. The royalty normally persists only as long as the right itself pertains. Once the right is extinguished, then so is the royalty payment.

of the pier simply do not fall into the class that was exempted. Therefore, the right to strip and stuff such containers was retained by longshoremen.

Intervenor Houff relies on a totally inapposite case, the *per curiam* determination of *Pacific Maritime Association* v. *NLRB*, 515 F.2d 1018 (D.C. Cir. 1975), *cert. den.*, 425 US 942 (1976) ("Cal. Cartage") which, without opinion, enforced an NLRB decision, 208 N.L.R.B. 994, with respect to containerization on the West Coast to which the ILA is a stranger. The pre-existing work patterns and the history of containerization on the two coasts are entirely different.* No court has found *Cal Cartage* controlling with respect to any case involving the Rules on Containers.** In neither of its decisions did the NLRB, or the respective Administrative Law Judge, rely on *Cal Cartage*. The Board did not cite the case to the District of Columbia Circuit and does not urge it here.***

Finally, any question of abandonment is resolved by the doctrine of work reacquisition recognized by the courts

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* See Ross, *Waterfront Response to Technological Change: A Tale of Two Unions*, 21 Lab. L.J. 397 (1970).

** It should be noted that the District Judge Robert Merhige of the Eastern District of Virginia sat by designation on the District of Columbia appellate panel that affirmed *Cal Cartage* in 1975. Later in the same year, Judge Merhige denied the Board's application for a 10(1) injunction in *Humphrey* v. *International Longshoremen's Association*, 401 F.Supp. 1401 (E.D. Va. 1975), *rev'd.* 548 F.2d 494 (4th Cir. 1976), on the very ground that the ILA had not abandoned the East Coast work but could recapture it. That Judge Merhige was reversed on other grounds does not change the fact that his familiarity with the record in both cases led him to distinguish the conduct of the two unions involved.

*** Moreover, in *Cal Cartage* the Board did not commit the error it has perpetrated in the instant case of looking at the work of the non-unit employees instead of the work of longshoremen. It made its ruling of focusing upon the work of West Coast longshore units, not of consolidators.

and the NLRB itself. Even if the record can be construed as supporting a conclusion that the ILA had not invariably or effectively enforced its right to all container work during the early years of automation, the later evolution of the Rules is still lawful.

Unquestionably, the same container revolution that generated consolidation and made possible the practice of shortstopping simultaneously decimated longshore work at the piers. The two phenomena are totally correlative. The work involved in consolidating containers or shortstopping, then, is "fairly claimable" by the ILA. *Meat and Highway Drivers, etc.* v. *NLRB*, 335 F.2d 709 (D.C. Cir. 1964); *Sheet Metal Workers International Association, Local Union No. 223* v. *NLRB*, 498 F.2d 687 (D.C. Cir. 1974). See also *Local Union No. 636 Plumbers* v. *NLRB*, 430 F.2d 906 (D.C. Cir. 1970); *Sheet Metal Workers Local No. 98* v. *NLRB*, 433 F.2d 1189 (D.C. Cir. 1970).

Similarly, the work was subject to "recapture", a principle approved by the Board, and sustained by the courts. *United Association of Pipefitters, Local 455*, 167 N.L.R.B. 602 (1967); *Retail Clerks, Local 648 (Brentwood Markets, Inc.)*, 171 N.L.R.B. 1218 (1968); *Teamsters Local Union 282, IBET (D. Fortunato, Inc.)*, 197 N.L.R.B. 124 (1972); *Retail Store Employees Local 876*, 174 N.L.R.B. 424 (1969); *American Boiler Manufacturers Association* v. *NLRB*, 404 F.2d 547 (8th Cir. 1968), *cert. den.* 398 US 960 (1970); *Canada Dry Corp.* v. *NLRB*, 421 F.2d 907 (6th Cir. 1970). See also Judge Merhige's analysis in *Humphrey I, supra.*

The very principles that warrant application of the Board-approved doctrine of recapture reemphasize the fundamental considerations in this case—that the ILA's activity was primary, directed to its own employers, and

designed to preserve the historic work of longshoremen.* The same considerations, then, which require a finding of primary, work-preservative activity also preclude any finding of "abandonment" if the Rules are found otherwise lawful.

POINT V

The Board's decisions should be vacated.

This Court should affirm the Court of Appeals' vacating of these rulings of the NLRB which are both erroneous and mischievous. The doctrine of work preservation has long been recognized as the will of Congress. *National Woodwork Manufacturers Association* v. *NLRB,* 386 US 612, 640-642 (1967). It is respectfully submitted that the concerns expressed by this Court and Congress apply with added vigor to the present case. The abolition of the work preservation doctrine, implicit in the Board's definition of the work in controversy, would be disastrous for American labor and perilous for the American economy, as well as contravening Congressional policy as enunciated in the Labor Management Relations Act,

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* Indeed, the Board's departure from its normal "recapture" approach in *Conex* was the occasion of analysis and criticism in an incisive and comprehensive annotation in the Harvard Law Review. The author observed:

> "The agreement in *Conex* illustrates this preservation aspect of recapture in that it would have protected longshoremen from incrimental effects of containerization which was accelerating after 1970. Second there is a discernible connection between the bargaining units and the subject of the pact. While more attenuated than in preservation—where the current jobs of the members are at stake—there is a historical relationship between the units and the new jobs which, in part, displaced its functions, a connection which is not in work acquisition agreements." *Work Recapture Agreements and Secondary Boycotts: ILA* v. *NLRB* (*Consolidated Express*), 90 Harvard Law Review 815 at 826.

29 USC §§ 141, 151. Moreover, acceptance of the Board's position would result in the novel and dangerous precedent of having the terms and conditions of a duly negotiated collective bargaining agreement subject to administrative veto. This Court should not sanction such a blatant and unwarranted intrusion by the Board into the fields of legislation and collective bargaining.

The doctrine of work preservation performs a useful, social function in softening the impact of technological change on labor relations and, indeed, the livelihoods of workers throughout the nation. In this it makes a significant contribution in avoiding or minimizing industrial strife and insuring the free flow of commerce. *NLRB* v. *Burns International Security Services, Inc.,* 406 US 272 (1972); *NLRB* v. *American National Insurance Company,* 343 US 395 (1952); *NLRB* v. *Bradford Dyeing Association,* 310 US 318 (1940); *American Communications Association, C.I.O.* v. *Douds,* 339 US 382 (1950). Experience has demonstrated that to welcome technological change without safeguards is to invite unforeseen difficulties and to weaken the ability of the union to protect its members.* The abandonment or weakening of work preservation in the face of rapid technological change would usher in a period of crippling labor strife which would obstruct the free flow of commerce, thereby damaging the already precarious American economy.

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* See, Ross, *Waterfront Labor Response to Technological Change: A Tale of Two Unions,* 21 Lab. L.J. 397 (1970). After comparing the response of the ILA and the ILWU to containerization, the author concluded, "There is reason to believe . . . that the optimistic rate in which labor-saving technology is introduced is not the fastest possible rate. To the extent that this is true, union impediments may be considered as not merely obstacles to progress, but as efforts to buy time in which the human costs of change can be softened and made more tolerable." *Id.* at 419.

The doctrine of work preservation is an inherently reasonable approach to facilitate the orderly introduction of technological change in the workplace.* Free collective bargaining allows the parties to arrive at an internal accommodation among competing social and economic values: industrial efficiency versus full employment and the introduction of new technology versus maximized sharing by workers in the increased profits resulting from such technology.** Thus, when viewed in its proper context, work preservation becomes a necessary part of the collective bargaining process by being a useful tool: (1) in establishing, revising and administering many of the rules of the workplace, and (2) in determining the compensation of employees for past and present services, and in influencing the distribution of the increased profits brought about by technological innovation.*** This is the very essence of national labor policy. *NLRB* v. *Local Union No. 1229, International Brotherhood of Electrical Workers,* 346 US 464 (1953); *NLRB* v. *Allis-Chalmers Manufacturing Company,* 388 US 175 (1967); *H. K. Porter Co.* v. *NLRB,* 397 US 99 (1970); *Local 24 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO* v. *Oliver,* 358 US 283 (1959); *Mastro Plastics Corp.* v. *NLRB,* 350 US 270

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* See "Reflections On The Role Of The NLRB And The Courts In The Collective Bargaining Process—A Fresh Look At Conventional Wisdom And Unconventional Remedies" by Charles J. Morris, pp. 9-17 in *Developing Labor Law,* edited by Frances Penn and Laurel Black, American Bar Association and the Section of Labor Relations Law 1977.

** For a practical approach on how labor and management deal with the issue of technological development, see *The Practice Of Collective Bargaining* by Edwin F. Beal and Edward D. Wickersham (Richard D. Irwin, Inc. Humewood, Ill. 1959) Chapter 23 "Technological Change", pp. 595-622.

*** See "The Social Utility Of Collective Bargaining" by John F. Dunlop, pp. 168-180 in *Chalenges To Collective Bargaining* (Prentice-Hall Englewood Cliffs, NJ 1967).

(1956). The test imposed by the Board in this case precludes any activity from being found to be work preservative. It should be rejected not only in the interest of legal correctness but for social and economic reasons as well.

Nor should the Board be permitted legally to redefine the work in controversy (and so control the result) on a case-by-case basis. Not only would such discretion lend itself to arbitrary and capricious abuse by an administrative agency, but it would also selectively undercut the rulings of this Court and the will of Congress. *National Woodwork, supra.* The whim of the NLRB would subject parties not only to the invalidation of their duly negotiated contracts, but also to serious pecuniary liabiltiy, as attested by the private litigation already engendered by the Rules on Containers.* The results would become so confused and unpredictable as to make effective collective bargaining negotiations impossible, in direct contravention of the purpose of the NLRA.

This Court has found in the very existence of the NLRB itself the specific intent of Congress that national labor policy be uniformly applied. *San Diego Building Trades Council, Millmen's Union, Local 2020, Building Material and Dump Drivers, Local 36* v. *Garmon,* 359 US 236, 242 (1959); *Garner* v. *Teamsters, Chauffeurs and Helpers Local Union No. 776,* 346 US 485, 490 (1953). That end would be frustrated if the Board is given free rein to change the ground rules in every case.

The affect of sustaining the Board's position would be to introduce chaos at the collective bargaining table. The Rules in the case at bar were consciously patterned on the basis of *National Woodwork* and refined and supplemented after initial vindication by the Board. Today they are challenged because of a reversal in the Board's posi-

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* Cf. *NLRB* v. *Bell Aerospace Co.,* 416 US 267, 295 (1974).

tion. Like respondents here, management and labor could never predict which way the Board will go in its selective definitions. The task of reconciling differences is difficult enough without the introduction of an unknown variable.

In short, to countenance what the Board has done would be to authorize a veto on the results of collective bargaining. Administrative *fiat* would replace the rule of law as the determinant in labor relations at the expense of collective bargaining in the private sector which is the cornerstone of our labor policy. *NLRB* v. *Sands Manufacturing Company,* 306 US 332 (1939).

To effectuate the intent of Congress, to preserve the integrity of its own prior decisions, and to secure for society the benefits of free collective bargaining, this Court should affirm the vacating of the Board's decisions.

CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

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